2001

Melvin H. Jensen v. MANILA CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Corporation Sole, and JOHN TINKER and GENEVIEVE L. TINKER, his wife : Reply Brief

Utah Supreme Court

Joseph C. Rust; Kirton, McConkie, Boyer and Boyle; Attorneys for Appellant.
Robert L. Backman; Backman, Clark and Marsh; Attorneys for Respondent.

IN THE SUPREME COURT OF THE STATE OF UTAH

MELVIN H. JENSEN,

Plaintiff, and Respondent,

vs.

MANILA CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Corporation Sole, and JOHN TINKER and GENEVIEVE L. TINKER, his wife,

Defendants. and Appellants.

Case No. 14806

REPLY BRIEF

APPEAL FROM A JUDGMENT AGAINST DEFENDANTS IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR DAGGETT COUNTY, STATE OF UTAH, THE HONORABLE J. ROBERT BULLOCK, JUDGE, PRESIDING.

ROBERT L. BACKMAN
Backman, Clark & Marsh
500 American Savings Bldg.
61 South Main Street
Salt Lake City, UT 84111

Attorneys for Respondent

JOSEPH C. RUST
Kirton, McConkie, Boyer & Boyle
336 South Third East
Salt Lake City, UT 84111

Attorneys for Appellant

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REPLY BRIEF

ARGUMENT

Appellant MANILA CORPORATION makes the following points in reply to the arguments raised in the response brief of respondent MELVIN JENSEN.

POINT ONE

THE PAROLE EVIDENCE RULE BARS RESPONDENT'S CLAIMS TO RECOVERY.

Respondent's answer to appellant's argument on this point came by way of attempting to distinguish the recent case of Percival vs. Cooper, 525 P.2d 41 (Utah 1974) cited by appellant and placing in its stead the older case of Sine vs. Harper, 118 Utah 415, 222 P.2d 571 (Utah 1950).

Respondent argues that Percival is not controlling in this case because it "can only be considered in connection with the facts of that case." It is true that

the closer a cited decision is on all fours with the facts in the case for which it is being cited the more persuasive it is as precedent. Nevertheless, the rule of stare decisis, by its very nature, permits some differences in facts between the two cases to occur and yet allows the one case to be binding authority for the other. Moreover, contrary to respondent's assertions, the case of Percival is very much on all fours with this present action and the principles enunciated in that case fully and completely cover the situation at hand here. In Percival the land described in the document of conveyance was measured in terms of so many feet by so many feet, exactly as was true here. In that case this Court held that the description was unambiguous. Also in Percival the buyer by using simple mathematics would have known exactly what he was getting, namely less than a half acre of land. In this case a simple measurement by the respondent, who after all by his own testimony was a prominent builder and developer, would have established exactly whether the land described in both the earnest money offer and, more importantly, in the subsequently executed real estate contract was the same size as the land he thought he was acquiring.

Respondent also claims that in Percival there was a meeting of the minds, "unlike the case presently before the Court." That is an incorrect statement of the

holding of Percival. The Court in that case never had to reach the question whether there was a meeting of the minds since the document conveying the land was clear and unambiguous. On the other hand, Justice Crockett dissented in that case specifically because, to him, the evidence showed that the sellers either were mistaken as to what property they intended to sell or they fraudulently misrepresented the size of the property to the buyers, in which case there was never a meeting of the minds. In the present case, as it has been shown clearly by affidavit and by testimony, the seller never intended to convey a piece of property larger than approximately one-third (1/3) acre and more specifically one hundred feet by one hundred fifty feet (100 ft. x 150 ft.). Nor was there ever any evidence that the seller attempted to defraud the purchaser into thinking that he, the buyer, was getting more land than the seller had available. As in Percival, there is here no need to reach the question of a meeting of the minds, because of the unambiguous document involved. But if such is argued, it is answered by the fact that both the seller and the buyer intended that the property to be conveyed would be a parcel one hundred feet by one hundred fifty feet (100 ft. x 150 ft.).

Respondent attempts to argue differences between the Percival case and the instant case and yet is perfectly willing to overlook the many differences between the Sine

case and the present case and to claim that Sine and not Percival is binding upon the Court on the facts of this case. An application of respondent's own definition of precedent defeats any use by him of Sine. In that case seller actually had additional land available for sale, which is not true here. Further there is evidence in that case that the seller intended to convey the additional property sought by the buyer, which is clearly not the case here. Finally, and most importantly, in Sine the description of the premises to be conveyed was fairly ambiguous, referring as it did only to a street address which was in the executed earnest money offer. Even the real estate contract perpetuated the use of the street address. In this case, the property was described in the earnest money offer not in terms of an address, although it was classified as the "abandoned LDS chapel," but more specifically in terms of the acreage involved. It should also be borne in mind that the only document executed by the parties in binding form was the contract of November 1, 1965, which specifically described the property involved. The earnest money agreement, described as exhibit D-4, although signed by both parties, was specifically made subject to the final approval of the Church's Law Department in Salt Lake City, which approval was never placed on the earnest money agreement.

* * * * * *

Since the facts in Sine are inapposite to the facts in this case, the conclusion reached in that case that reformation should be allowed is clearly not applicable here. Nevertheless, the general principles laid down in Sine, just like the general principles laid down in Percival, both in the main opinion and in the dissent, are applicable here. If that were not true, the Court in Percival would have had no other alternative than to overrule the holding of Sine. That they did not do so nor even need to do so comes because the basic principles remain the same, namely, that only where there is mutual mistake or mistake on part of one and fraud on the part of another can a court intervene and apply parole evidence to reform the contract in question. The further rule as announced by Percival is that where the document on its face is clear and unambiguous, parole evidence should not be allowed to change the terms of the document. This is for the good and basic reason that if a document is clear and unambiguous, its very simplicity argues against any claim of mutual mistake or fraud. This is the clear holding in Percival since, as the dissent in that case points out, there appeared to be some evidence of mutual mistake or fraud despite the clear and unambiguous nature of the document sought to be reformed. In the case now before the Court, however, there is, first of all, a clear and unambiguous document and, secondly, no evidence or indication that there was either

mutual mistake or fraud involved.

With the clear precedent of Percival the lower court erred in not granting appellant's Motion for Summary Judgment and erred further in not ruling in favor of appellant at the conclusion of the trial of the case.

POINT TWO

EVEN IF PAROLE EVIDENCE IS ALLOWED, THERE IS NO BASIS FOR REFORMATION.

To establish the intent of the seller in selling the property in question, testimony was obtained from the person who, at the time of the transaction, was the only member or officer of the appellant corporation. He was the corporation sole and as such was the only person to speak for the corporation. This power of the corporation sole to act by himself and without authority from others or without a board of directors is amply provided in Utah Code Ann. §16-7-1, et. seq.

The testimony of the said corporation sole, Albert Neff, was unequivocal that prior to offering the land for sale he had looked up the deed to determine the measurements of the property to be sold. He calculated that the Church had very close to a third (1/3) of an acre. (Tr. 73) He also was aware that a survey would be necessary to establish exactly how the property fit on the land. At no time did he think that the property the Church was selling was all that within the fences because

he knew that "fences don't indicate property at all here in Manila." (Tr. 74) His further testimony is he indicated to Mr. Dan Brown, the realtor involved, that there should be a survey because of such problems. (Tr. 73) Hence, the only person who was authorized to say what the appellant corporation knew, thought, or intended testified unequivocally that all of the land described in the contract of sale executed by the parties was exactly the land which the corporation intended to sell and no other.

There is argument by respondent that the realtor conveyed a different impression to the seller than appellant intended, hence a mutual mistake was created. Evidence of the understanding of an agent is only useful on this point, however, if that is a way to determine the actual intent of the principal at the time in question. Cf. Janke vs. Beckstead, 8 Utah 2d 247, 332 P.2d 933(1958). On the other hand, in this case the true intentions of the appellant were introduced into evidence. Nor was there any testimony which contradicted what Mr. Neff said with regard to what he understood as to the size and boundaries of the property in question. Equity in such a case asks not whether an agent can bind a seller to complete a sale, but rather what the true intention of the parties was at the time of the execution of the document of transfer. 66 Am Jur 2d, Reformation of Instruments §23. What the agent understood in this case does not at all reflect what the appellant

understood and intended. Hence there was no mutual mistake.

Since there was no mutual mistake and since there was no evidence submitted by the respondent making any claim for fraud, to allow the parole evidence submitted at trial to come in this case would not permit reformation of the contract. Respondent argues in his brief on this point: "What is relevant is not what they [the corporation sole and the realtor] knew, even assuming that that was the case, but what they represented to the respondent." Respondent's Brief, Page 9. That respondent is incorrect in his statement is clear from the cases heretofore cited.

Even so, respondent received from the realtor an earnest money offer which he signed, which described the property as one-third (1/3) of an acre. The respondent also signed the real estate contract which specifically described the property. It should also be kept in mind, contrary to the inferences found on Page 10 of Respondent's Brief, that at no time did appellant own a parcel in this area larger than one hundred feet by one hundred fifty feet (100 ft. x 150 ft.). It is true that between the time respondent signed the earnest money offer and the time the contract in question was executed appellant exchanged property with a neighbor in order to correct a mistake in property lines. But that exchange of property gave appellant no more property than it previously had. Hence, if what respondent is saying is that the property which should

be conveyed to him is that which appellant held title to at the time of respondent's signing the earnest money agreement, respondent still would be getting less property than he seeks in the action at hand.

POINT THREE

RESPONDENT'S RELIEF, IF ANY, WOULD BE RESCISSION AND NOT SPECIFIC PERFORMANCE.

Respondent's position has always been that it is entitled to reformation of the document and enforcement of the document in question as reformed. It is clear however that since appellant does not hold title to any other property than is described in the contract in question, respondent's recourse was for rescission and for damages. Respondent however did not ever ask for rescission and has had only one theory, namely, specific performance. Moreover, the lower court granted only ONE DOLLAR ($1.00) in damages on which point respondent has not chosen to appeal. Therefore, respondent is not entitled to require appellant to grant by warranty deed property to which appellant does not hold title.

POINT FOUR

RESPONDENT WAS GUILTY OF LACHES.

Respondent makes the claim on Page 11 of his Brief that the reason he did not file suit sooner was because the parties were attempting to get the matter resolved. This is also claimed as the reason why he was late in making

his payments. However, as Appellant's Brief amply points out, and as the documents admitted to by respondent so clearly show, any problems of which respondent had knowledge were not conveyed to any representatives for appellant until late in 1969. Nonetheless, the payments for 1966, 1967, 1968, and 1969 were all late and the payment for 1970 was never made. If the problems with the real estate description was the cause of his late payments, respondent never made those problems known to the appellant until at least late in 1969. Moreover, once the problems were made known to appellant, and after some discussion of resolution of the same which never came to fruition, respondent nonetheless let the matter lie until after appellant had taken legal action against respondent.

Respondent argues that appellant's claim of laches must fail for lack of showing of damage or prejudice to appellant by reason of respondent's delayed bringing of the lawsuit. Such damage or prejudice, however, is easily established. If the lower court's ruling were sustained, appellant would have an action against the realtor, Dan Brown, for negligence or improper representations in handling the sale of the property in question. All of Mr. Brown's activities for appellant occurred in May of 1965 or before, however, and it was not until November or December of 1969, more than four (4) years later, that respondent even made appellant aware of any

problems, although he knew of the same at least several years earlier. Hence any claims appellant would have had against Brown are barred by the Statute of Limitations. Utah Code Ann. §78-12-25. All of the above is supported by the evidence submitted in this case. Clearly there has been damage or prejudice to appellant because of respondent's inaction.

POINT FIVE

APPELLANT IS ENTITLED TO A FORFEITURE OF THE REAL ESTATE CONTRACT OF SALE.

Forfeiture is the proper remedy in this case inasmuch as the appropriate notices were sent and ignored. Respondent argues that it was given no opportunity to cure the delinquency. Contrary to the statement in Respondent's Brief on Page 20, the original notice sent to respondent served on respondent on June 24, 1975, says that if delinquent payments, including delinquent taxes, penalties, attorney's fees, and costs of the action, are not paid as of June 30, 1975, by the hour of 5:00 p.m. "said contract will be forfeited by you [respondent] to the said Manila Corporation of the Church of Jesus Christ of Latter-day Saints effective as of said time and date." The second notice dated July 16, 1975, and served on respondent July 17, 1975, indicates that because he did not correct the delinquency, he had therefore forfeited his rights in the property and was therefore a tenant at will. The forms used (Exhibits

A and B of Appellant's Request for Admission) are standard in Utah and give the full notice required by the contract pursuant to which they were sent and served.

With regard to the claim that respondent's loss would be too great if the property inquestion were forfeited, that is a matter which is to be weighed by this Court. However, it is submitted that because of the unusual delay by respondent in paying for the property in question, because of the benefits which respondent has derived from the property, including receiving the rent from the property on a daily and monthly basis, (Tr. 39, 40) and weighing all of the other facts of the case, it is not unconscionable for this Court to declare a forfeiture of the property and to consider the amounts paid in as liquidated damages. Jensen vs. Nielsen, 26 Utah 2d 96, 485 P.2d 673 (1971).

SUMMARY

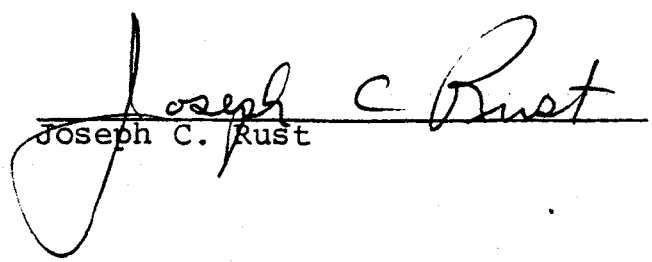
Appellant has never had more than a one hundred by one hundred fifty feet (100 ft. x 150 ft.) piece of property available to sell in Manila, Utah. Despite respondent's claimed expectations, appellant knew that it had no more property to sell than the one hundred by one hundred fifty feet (100 ft. x 150 ft.) parcel. It would be manifestly unjust and improper for this Court to find that respondent can now insist that appellant convey to him not only the property described in the contract, which is clear and unambiguous, but also property to which it does

not hold title. Furthermore, appellant properly gave notice to respondent of the extreme deficiencies in the payment of the amounts due under the contract, which notice respondent chose to ignore even though respondent was given an opportunity in which to cure the deficiency. Appellant therefore should be entitled to enforce its forfeiture of the property and have this Court reverse the ruling of the lower court and quiet title to the parcel in the appellant.

DATED this 9 day of March, 1977.

Respectfully submitted,

KIRTON, McCONKIE, BOYER & BOYLE



Joseph C. Rust

CERTIFICATE OF DELIVERY

I herewith and hereby certify that I hand delivered a copy of the foregoing Reply Brief to Attorney Robert L. Backman, Backman, Clark & Marsh, 500 American Savings Building, 61 South Main Street, Salt Lake City, Utah, attorney for respondent, this 10 day of March, 1977.